In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 63

THE STATE OF OHIO, *ex rel.*, NELLIE HUNTER, ON BEHALF OF THE CITY OF AKRON,

Appellant,

v.

EDWARD O. ERICKSON, MAYOR OF THE CITY OF AKRON, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

MOTION TO DISMISS
and
STATEMENT OPPOSING JURISDICTION.

WILLIAM R. BAIRD,
Director of Law,
ALVIN C. VINOPAL,
Assistant Director of Law,
Municipal Building,
Akron, Ohio,
Attorneys for Appellees.

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MOTION TO DISMISS.

Appellees in the above styled cause, pursuant to Rule 16 (1) (d) and (1) (b) of the rules of the Supreme Court of the United States, move that the appeal be dismissed and the judgment of the Supreme Court of Ohio be affirmed on the grounds that, by virtue of the Civil Rights Act of April 11, 1968, the Fourteenth Amendment issue raised herein is now moot; that the decision of the Supreme Court of Ohio does not deny appellant equal protection of the laws contrary to Section One of the Fourteenth Amendment of the Constitution of The United States; that the decision of the Supreme Court of Ohio does not

present a substantial federal question; that the decision of the Supreme Court of Ohio rests on an adequate non-federal basis.

STATEMENT OPPOSING JURISDICTION.

The Appellees in the above entitled cause for their statement in opposition to Appellant's statement as to jurisdiction and in support of their motion to dismiss or affirm, respectfully state the following:

STATEMENT OF THE CASE.

The Akron Fair Housing legislation became effective on July 18, 1964, but on August 25, 1964, initiative petitions for Charter Amendment Section 137, which would invalidate such legislation until approved by the electors, were filed with the Clerk of Council. The complaint of appellant was filed approximately 150 days after the initiative petitions had been filed and about 80 days after the Charter Amendment was approved by the electors.

ARGUMENT.

(A) Claim of denial of equal protection of the laws in violation of the Fourteenth Amendment, is now moot.

The 90th Congress of the United States passed a new act known as Public Law 90-284; H. R. 2516 which was approved on April 11, 1968. Title Eight (8) thereof provides for fair housing throughout the United States. The complaint asserted by the appellant is now prohibited by Section (804) of Title (8) of the act and, therefore, the Constitutional issue raised by the appellant is now moot. (See Appendix A, *infra*, pp. 7-8)

This Court has followed the practice of not passing upon moot questions. The Federal question raised herein

is now important only to the parties and does not require the resolution of principles, the settlement of which are important to the public. See:

Rice v. Sioux City Cemetery, 349 U. S. 70;
N. L. Liner v. Jafco Inc., 375 U. S. 301;
United States of America v. Alaska Steamship Co., 253 U. S. 111.

(B) Decision of the Supreme Court of Ohio does not deny appellant equal protection of the laws contrary to Section (1) of the Fourteenth Amendment of the Constitution of the United States.

Section Two (2) of Article One, (I) of the Constitution of the State of Ohio provides:

> "All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly."

The Akron Charter Amendment was a lawful alteration by the people of Akron in the legislative procedural form of their local government. Neither the Federal nor the State Constitutions required Akron to have a fair housing law.

The City Council, if it had been so disposed, may well have refused to enact fair housing legislation. This would have left the proponents to pursue the matter by initiative petition upon the signatures of 7% of the electorate. In that event appellant would be more amenable to the will of the people than she is now with the Charter provision and there could be no equal protection issue.

Under the charter in its present posture we find that the City Council may pass fair housing legislation and appellant is not required to obtain one single signature in order to get the measure before the electorate. Charter Amendment 137 is no block—no advance repealer. It is but an extension of one of the highest democratic processes constitutionally provided under our republican form of government.

If fair housing legislation should become a one-way street, the whole structure of constitutional guarantees to the people may well collapse. The Supreme Court of Ohio has reconciled freedom with equality and thus preserved the orderly processes of government.

We are unable to find where this Court in *Reitman v. Mulkey* held that California could not now repeal its restored fair housing legislation. This Court has traditionally avoided imposing federal constitutional limits on the allocation of lawmaking process within the state government. See

Highland Farm Dairy Inc. v. J. D. Agnew, 300 U. S. 608;

Pacific States Tel & Tel v. State of Oregon, 223 U. S. 118.

(C) The decision of the Supreme Court of Ohio does not present a substantial federal question.

The Supreme Court of Ohio made absolutely no finding of state involvement. There was no fact finding which established the existence of an environment of private discrimination encouraged by the state. On the other hand, the Court found that the inclination to proceed solely in Fair Housing was the immediate object of the amendment and that as such was a reasonable and permis-

sible objective under Articles I and XVIII of the Ohio Constitution.

There was no finding that the ultimate impact of the amendment would result in state encouragement of private discrimination. In the absence of facts to the contrary, it would seem that this Court would be without precedent to overrule the Ohio court.

When the purpose, scope, and operative effect of charter Amendment 137 is examined by reasonable minds, the conclusion is inescapable that the state by and through the City of Akron had not been involved in encouraging private racial discrimination in housing. The Supreme Court of Ohio rendered a unanimous decision written by its Chief Justice.

It cannot be fairly said that the right to discriminate in Akron is immune from legislative, executive, or judicial regulation at any level of the state government. The State of Ohio now has a fair housing law. Chapter 4112 of Title 41, Ohio Revised Code, has been amended to make unlawful certain discriminatory practices relating to commercial housing and private residences. These amendments became effective October 30, 1965. (See Appendix B, *infra*, pp. 8-12.)

(D) A determination of the federal question raised by appellant was not necessary in the decision rendered by the Ohio Supreme Court and the decision as rendered was based upon adequate non-federal grounds and should not be reviewed by this Court.

The proceedings before the state court, for the most part, concerned the determination of whether the fair housing legislation came under the definition of a regulatory measure. Appellant contended that it was prohibitory and thus should not be governed by Amendment 137

because that amendment made no reference to prohibited acts.

The Supreme Court of Ohio held that the housing ordinances were regulatory measures permissible by Ohio Home Rule. The federal question was in no way necessary to this determination because the essential issue was one governed by Ohio law.

Although the decision of the Ohio Supreme Court may well rest upon the federal ground as well as a non-federal one, since the non-federal ground is independent of the federal ground and is adequate to support the judgment, the decision should not be disturbed. See:

Nick Jankovich v. Indiana Toll Rd. Com., 379 U. S. 487;

John G. Fischer v. City of St. Louis, 194 U. S. 362.

CONCLUSION.

It is respectfully submitted therefore that the decision of the Supreme Court of Ohio does not deny appellant equal protection of the laws; that the decision is based upon adequate and independent non-federal grounds; that no substantial federal question is presented; that the federal question, if any, is now moot and that this appeal should be dismissed.

Respectfully submitted,

WILLIAM R. BAIRD,
Director of Law,
ALVIN C. VINOPAL,
Assistant Director of Law,
Attorneys for Appellees.